

No. 22-1078

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IN THE  
**Supreme Court of the United States**

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WARNER CHAPPELL MUSIC, INC., ET AL.

*Petitioners,*

v.

SHERMAN NEALY, ET AL.,

*Respondents.*

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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**BRIEF FOR THE RESPONDENTS**

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## **QUESTION PRESENTED**

As limited by this Court, the Question Presented is: Whether, under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil actions, 17 U.S.C. § 507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit.

## **CORPORATE DISCLOSURE STATEMENT**

Music Specialist, Inc. is a privately held Florida corporation. None of its shares are held by a publicly traded company.

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## **STATUTORY PROVISIONS INVOLVED**

Sections 504, 507 and 1323 of Title 17 of the United States Code provide:

### **§ 504. Remedies for infringement: Damages and profits**

**(a) In General.**—Except as otherwise provided by this title, an infringer of copyright is liable for either—

**(1)** the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

**(2)** statutory damages, as provided by subsection (c).

**(b) Actual Damages and Profits.**—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

**(c) Statutory Damages.**—

**(1)** Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time

before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

**(2)** In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published

nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

**(3)(A)** In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

**(B)** Nothing in this paragraph limits what may be considered willful infringement under this subsection.

**(C)** For purposes of this paragraph, the term “domain name” has the meaning given that term in section 45 of the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes” approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946”; 15 U.S.C. 1127).

**(d) Additional damages in certain cases.**—In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an



additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

### **§ 507. Limitations on actions**

**(a) Criminal Proceedings.**—Except as expressly provided otherwise in this title, no criminal proceeding shall be maintained under the provisions of this title unless it is commenced within 5 years after the cause of action arose.

**(b) Civil Actions.**—No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

### **§ 1323. Recovery for infringement**

**(a) Damages.**—Upon a finding for the claimant in an action for infringement under this chapter, the court shall award the claimant damages adequate to compensate for the infringement. In addition, the court may increase the damages to such amount, not exceeding \$50,000 or \$1 per copy, whichever is greater, as the court determines to be just. The damages awarded shall constitute compensation and not a penalty. The court may receive expert testimony as an aid to the determination of damages.

**(b) Infringer's profits.**—As an alternative to the remedies provided in subsection (a), the court may award the claimant the infringer's profits resulting from the sale of the copies if the court finds that the infringer's sales are reasonably related to the use of the claimant's design. In such a case, the claimant shall be required to prove only the amount of the infringer's sales and the infringer shall be required to prove its expenses against such sales.

**(c) Statute of limitations.**—No recovery under subsection (a) or (b) shall be had for any infringement committed more than 3 years before the date on which the complaint is filed.

**(d) Attorney's fees.**—In an action for infringement under this chapter, the court may award reasonable attorney's fees to the prevailing party.

**(e) Disposition of infringing and other articles.**—The court may order that all infringing articles, and any plates, molds, patterns, models, or other means specifically adapted for making the articles, be delivered up for destruction or other disposition as the court may direct.

## STATEMENT

The Question Presented is about remedies. It asks whether the Copyright Act permits a plaintiff to recover damages for timely-filed claims where the acts of infringement giving rise to the claims occurred more than three years before the lawsuit was filed.

The Question Presented is not about what triggers the Copyright Act statute of limitations in the first place. It does not ask whether a Copyright Act claim accrues upon discovery of the infringing act or upon its occurrence. The Court expressly excluded that issue from this appeal, adding to the Question Presented a limiting assumption that Copyright Act claims accrue “under the discovery accrual rule applied by the circuit courts”. Petitioners concede as much. *See* Pet.Br. 31.

Yet, despite the Court’s clear directive and Petitioners’ own concession, Petitioners spend virtually their entire brief arguing against the limitation in the Question Presented, claiming that the Copyright Act does not in fact use a discovery rule to determine claim accrual. That is improper.

The Eleventh Circuit certified only one question for interlocutory review: “[w]hether the three-year statute of limitations under 17 U.S.C. § 507(b) ***bars the recovery of damages*** incurred more than three years prior to filing suit ***when the discovery rule dictates the accrual of a copyright claim***”. *Nealy v. Atl. Recording Corp.*, 2022 WL 18354071, at \*2 (11th Cir. Dec. 15, 2022) (emphases added).

When the Eleventh Circuit answered that question in the negative—holding that the Copyright Act has no separate damages bar, such that damages are available for all timely claims—Petitioners urged the Court to grant certiorari to resolve a circuit split on that narrow remedies issue. Specifically, before the Eleventh Circuit’s decision here, the Second Circuit, in *Sohm v. Scholastic Inc.*, 959 F.3d 39, 52 (2d Cir. 2020), held that, although the discovery rule determines when a claim accrues under the Copyright Act’s statute of limitations, there also exists a separate damages bar—“explicitly disassociated from” the statute of limitations—that limits damages to those incurred during the three years prior to suit. No other court of appeals agrees with the *Sohm* rule. Resolving that disagreement was the reason Petitioners gave for why this Court should grant certiorari.

But in their merits brief, Petitioners do not even cite *Sohm*’s holding—let alone defend it. Instead of defending *Sohm*’s damages bar for claims made timely by the discovery rule, Petitioners argue that the discovery rule does not apply to copyright claims at all, even though, as Petitioners also concede, that issue was not raised or decided below and it is one on which “a conflict in the courts of appeals has not yet developed”. Pet. 14 n.\*.

Because Petitioners persuaded the Court to grant certiorari to resolve a circuit split on a narrow remedies issue, but then abandoned that issue in their merits brief, the Court should dismiss the writ of certiorari as improvidently granted. At a minimum, the Court should limit its review to the narrow

certified question accepted and decided by the Eleventh Circuit below and presented here by the Court's reframed Question Presented.

Turning to that question, the courts of appeals uniformly hold that, when the discovery rule dictates the accrual of a copyright claim, the claim will be timely so long as it is asserted within three years after the act giving rise to the claim is or reasonably should have been discovered. There is no debate in the lower courts about that principle, even in the Second Circuit. The only disagreement is about whether a copyright plaintiff taking advantage of the discovery rule can recover damages for its claims.

The majority rule permits damages as a remedy for all timely Copyright Act claims. Under the majority rule, there is no separate "damages bar" operating independently of the statute of limitations, only the statute of limitations that appears in the text of the Copyright Act itself.

The Second Circuit has a peculiar rule that it alone follows. There, a copyright claim can be timely pursuant to the discovery rule, but a copyright plaintiff successfully invoking the discovery rule is barred from recovering "retrospective relief" for that claim. The Second Circuit imposes a separate "three-year lookback" damages bar "explicitly disassociated" from the Copyright Act's statute of limitations. *Sohm*, 959 F.3d at 52.

Nothing in the Copyright Act—or this Court's precedents—permits that result.

The Copyright Act's default statute of limitations provision, Section 507(b), does not distinguish between claims seeking damages and claims seeking other forms of relief. The Copyright Act's default remedies provision, Section 504, states that a successful plaintiff is "entitled to recover" its "actual" damages and "any" profits of the infringer, or statutory damages for "all infringements involved in the action". 17 U.S.C. § 504(a)-(c). *Sohm's* damages bar is incompatible with those provisions.

Other provisions of Title 17, dealing with vessel hull design (17 U.S.C. § 1323(c)) and enhanced damages for proprietors of public establishments (17 U.S.C. § 504(d)), **do** impose a limited three-year look-back damages bar incompatible with a discovery rule, but only for those narrow types of claims. Thus, "Congress implicitly excluded a general [damages bar] by including a more limited one" and implicitly **included** a general discovery rule by excluding it only in limited circumstances. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001). Petitioners' arguments run contrary to Congress's clear intent.

Nor has this Court announced a damages bar for timely-filed copyright claims. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014), the Court merely held that (i) the equitable defense of laches cannot be used to shorten the Copyright Act's statute of limitations period and (ii) each act of infringement gives rise to its own claim and each claim is time-barred, in its entirety, if that particular claim is not asserted within three years of when it accrues. *Petrella* did not address claim accrual under

the discovery rule, and did not limit the remedies available for claims rendered timely by its operation.

### **A. Background.**

Respondent Sherman Nealy founded Respondent Music Specialist, Inc. (“MSI”) in 1983. 3 C.A.App. 49. Nealy provided the money for MSI’s operations. C.A.Supp.App. 609. Nealy hired Tony Butler as an employee to create music for MSI. 3 C.A.App. 49-50. Between 1983 and 1986, Butler wrote a number of musical works for MSI under a work-for-hire program, including the eight musical works in Nealy’s and MSI’s initial complaint. *Id.* at 49-50, 58-59; Pet.App. 21a-25a. Only two musical works, “Lookout Weekend” and “The Party Has Begun”, are at issue on this appeal. Pet.App. 29a; C.A.Supp.App. 659-60.

Nealy was incarcerated from March 1989 to March 2008, and from February 2012 to September 2015. C.A.Supp.App. 611-12, 615. MSI was dissolved in 1986 but reconstituted in 2017. *Id.* at 611.

Nealy and MSI never authorized Butler to license MSI’s music. *Id.* at 611-12. Nevertheless, starting in 1989, when Nealy was in prison, and over the next twenty years, Butler unlawfully purported to license MSI’s copyrighted works. From 1989 to 1992, Butler purported to license MSI works to Pandisc Music Corp. (“Pandisc”) and Whooping Crane Music, Inc. (“Whooping Crane”). *Id.* Nearly two decades later, in 2008, Butler purported to license MSI works to Petitioner Artist Publishing Group, LLC (“APG”). 3 C.A.App. 35. Petitioner Warner Chappell Music, Inc. (“Warner”) began administering the musical works for APG in 2008. C.A.Supp.App. 612, 614.

In 2008, between his first and second incarcerations, Nealy learned that MSI works were being distributed by Pandisc and Whooping Crane, completely different companies from Petitioners. *Id.* at 611. He met in 2008 with a representative of those companies, who asserted that MSI works had been licensed to the companies between 1989 and 1992, sixteen years earlier. *Id.* at 611-12. Nealy submitted evidence that he did not learn—and had no reason to believe—that Butler had separately licensed MSI works *to Petitioners APG and Warner* at any time before returning to prison in 2012. Pet.App. 31a.

During his second stint in prison, Nealy had no contact with the music industry. C.A.Supp.App. 612. Nealy was released from prison in the fall of 2015. *Id.* Nealy submitted evidence that he learned for the first time in January 2016 that Butler had unlawfully licensed MSI works to Petitioners. 3 C.A.App. 53. He filed suit less than three years later.

## **B. Proceedings.**

### **1. District Court Proceedings.**

On December 28, 2018, Respondents sued Petitioners in the United States District Court for the Southern District of Florida. *See* 1 C.A.App. 52. Respondents sought injunctive relief, impoundment, profits, damages, fees and costs under the Copyright Act. *See id.* at 51-52.

The Parties moved for summary judgment. Petitioners expressly conceded that the discovery rule applied and argued that, because Nealy supposedly learned or should have learned that Petitioners were



violating his ownership rights more than three years prior to suit, Respondents' claims were barred by the statute of limitations. *Id.* at 189-204; 2 C.A.App. 83-86; 3 C.A.App. 19-27. Petitioners further argued that, even if Respondents' claims were timely, damages only could be recovered for infringements that occurred during the three years prior to suit. 1 C.A.App. 204-07; 2 C.A.App. 86-87; 3 C.A.App. 27-29.

The magistrate judge issued a report and recommendation holding that Respondents had not established ownership for four of the eight works, but that there were triable issues of fact as to the other four, including whether Respondents knew, or should have known, that Petitioners were infringing those works prior to 2016. 3 C.A.App. 59-73. The district court adopted the magistrate judge's recommendation. *See* Pet.App. 31a-32a (finding that "reasonable minds could differ on . . . whether Nealy had reason to know that Defendants were infringing").

The district court also held that, even though the timeliness of Respondents' claims was an issue for trial, Respondents' potential damages were limited as to the three-year period prior to filing suit as a matter of law, relying on *Sohm*. *Id.* at 26a-27a. The district court certified that holding as a controlling question of law for interlocutory appeal to the Eleventh Circuit pursuant to 28 U.S.C. § 1292(b). Pet.App. 35a-39a.

## 2. Interlocutory Appeal to the Eleventh Circuit.

The Eleventh Circuit granted Respondents' appeal, No. 21-13232, under 28 U.S.C. § 1292(b), but limited its exercise of appellate jurisdiction to the following question:

Whether the three-year statute of limitations under 17 U.S.C. § 507(b) bars the recovery of damages incurred more than three years prior to filing suit when the discovery rule dictates the accrual of a copyright claim?

*Nealy*, 2022 WL 18354071, at \*2.<sup>1</sup>

The Eleventh Circuit did not agree to hear and did not decide whether the discovery rule is correct, or even whether Respondents' claims are timely under that rule. Rather, the only question the Eleventh Circuit accepted for review was whether, ***assuming Respondents' claims are timely under the discovery rule***, Respondents nevertheless are barred from recovering damages beyond the three-year period prior to the filing of the complaint. *Id.*; *see also* Pet.App. 2a-3a, 7a ("The question in this appeal is whether the Copyright Act's statute of limitations, 17 U.S.C. § 507(b), precludes a copyright plaintiff from

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<sup>1</sup> The court dismissed Petitioners' appeal, No. 21-12458, from the district court's entry of final judgment under Fed.R.Civ.P. 54(b) as to ownership of the copyright on a third song, "Jam the Box". *Id.* at \*1-2; Pet.App. 38a-39a.

recovering damages . . . even if the plaintiff's suit is timely under our discovery rule.”).

Answering that certified question, the Eleventh Circuit reversed, “conclud[ing] that where a copyright plaintiff has a timely claim for infringement occurring more than three years before the filing of the lawsuit, the plaintiff may obtain retrospective relief for that infringement”. Pet.App. 17a. The Eleventh Circuit noted that “[t]he defendants’ argument begins and ends with *Petrella*” but reasoned that “*Petrella* did not present the question whether a plaintiff could recover for harm that occurred more than three years before the plaintiff filed suit if his claim was otherwise timely under the discovery rule.” Pet.App. 11a. Instead, “the Court’s statements in *Petrella* merely describe the operation of the injury rule on the facts of that case and others like it”, Pet.App. 12a, and “the Court in *Petrella* expressly addressed the discovery rule and preserved the question whether the discovery rule governs the accrual of copyright claims”, Pet.App. 14a. “In short, the defendants’ reading of *Petrella* ignores the question presented, conflates the Court’s discussion of claim accrual under the injury rule with the availability of damages under the discovery rule, and cannot be squared with the Court’s express preservation of the discovery rule.” Pet.App. 15a.

The Eleventh Circuit also held that “[t]he plain text of the Copyright Act’s statute of limitations does not limit the remedies available on an otherwise timely claim”, nor do “[t]he Copyright Act’s damages provisions . . . place a three-year limitation on the recovery of damages for past infringement.”

*Id.* at 15a-16a. “Given that the plain text of the Copyright Act does not support the existence of a separate damages bar for an otherwise timely copyright claim, we hold that a copyright plaintiff with a timely claim under the discovery rule may recover retrospective relief for infringement that occurred more than three years prior to the filing of the lawsuit.” *Id.* at 16a.

### 3. Petition for Certiorari.

Following the Eleventh Circuit’s interlocutory decision, Petitioners filed a petition for certiorari, requesting review of the following question:

Whether the Copyright Act’s statute of limitations for civil actions, 17 U.S.C. 507(b), precludes retrospective relief for acts that occurred more than three years before the filing of a lawsuit.

Pet. I.

In their petition, Petitioners asserted that the “Eleventh Circuit’s decision was erroneous and deepened an acknowledged conflict on the question presented”, explaining that the “Second Circuit has held that financial recovery is limited to three years before the filing of suit, but the Ninth and Eleventh Circuits now disagree.” *Id.* at 3. Petitioners explained that because “[t]his case comes to the Court after the district court certified the question for interlocutory review . . . , it is a pristine vehicle for the Court to decide the meaning of the Copyright Act’s statute of limitations.” *Id.* Again, the only question the Eleventh Circuit certified for interlocutory review

concerned whether damages are available “when the discovery rule dictates the accrual of a copyright claim”. *Nealy*, 2022 WL 18354071, at \*2.

Petitioners’ petition for certiorari contained a section entitled “Reasons for granting the petition” and, in that section, gave only two reasons: “[t]he decision below conflicts with the decisions of other courts of appeals” and “[t]he question presented is exceptionally important and warrants review”. Pet. 10, 14. That was the case, Petitioners explained, because the circuit split regarding whether there is a separate damages bar rendered copyright law inconsistent across major commercial centers (Los Angeles and Miami versus New York). *Id.* at 10. Again, the only circuit split concerns whether there is a separate damages bar; there is no disagreement among the courts of appeals that the discovery rule governs claim accrual under Section 507(b).

In a footnote, Petitioners acknowledged that *Petrella* “left open the question whether the discovery rule applies in Copyright Act cases” and that “a conflict in the courts of appeals has not yet developed on that antecedent question”. *Id.* at 14 n.\*. Petitioners also conceded that “[t]he availability of the discovery rule was not challenged below”. *Id.*

This Court “granted [the petition] *limited* to the following question: whether, *under the discovery accrual rule applied by the circuit courts* and the Copyright Act’s statute of limitations for civil actions, 17 U.S.C. § 507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit.” Cert. Grant (emphasis added).

## SUMMARY OF ARGUMENT

A. Having urged this Court to grant review of what Petitioners described as “an entrenched conflict among three federal courts of appeals”, *see* Pet. 10, and having received a grant of certiorari limited to that question, Petitioners now focus instead on a different question, which was not raised or decided below and on which the courts of appeals unanimously agree, *see id.* at 14. Whether the Copyright Act has a discovery rule was not part of the certified question in the Eleventh Circuit on which the petition for certiorari was based, was not preserved by Petitioners below, is not encompassed in the Question Presented as limited by this Court and, respectfully, should not be decided in this appeal.

B. Focusing on the actual Question Presented, the Court should adopt the majority rule and reject the outlier Second Circuit rule. The majority rule is straightforward, logical, consistent with the text and meaning of the Copyright Act, and in line with this Court’s precedents. It holds, simply, that each act of infringement gives rise to a separate claim (as required by *Petrella*), each claim accrues when it is or should have been discovered (as assumed by the Question Presented), each claim is timely so long as it is brought within three years of its accrual (as expressly stated by Section 507(b)), and damages and all other remedies are available for all timely claims (as expressly stated by Section 504). That is how the Copyright Act has worked for decades.

C. The holding in *Sohm* cannot be correct.

*First*, the Copyright Act has no separate damages bar dissociated from its statute of limitations. Petitioners point to none. Rather, Title 17 has a single default statute of limitations for civil claims, Section 507(b), which does not distinguish between claims seeking damages and those seeking other forms of relief. 17 U.S.C. § 507(b). The Copyright Act’s default remedies provision, Section 504, states that a copyright holder is “entitled to recover” its “actual” damages, “any” infringer’s profits, or statutory damages for “all infringements involved in the action”. 17 U.S.C. § 504. That leaves no room for *Sohm*’s damages bar.

When Congress has wanted to enact a three-year look-back damages bar in Title 17, it has done so. Specifically, 17 U.S.C. § 1323(c) states that “[n]o recovery under subsection (a) or (b) [for hull design infringement] shall be had for any infringement committed more than 3 years before the date on which the complaint is filed.” That *is* a look-back damages bar, expressly based on when the infringement was “committed”, for claims involving hull design. It was added to Title 17 in 1998 as a narrow exception to the default rule of Section 507(b). Interpreting Title 17 generally to impose a three-year look-back damages bar—or interpreting the default statute of limitations to be based on when the infringement occurred or “was committed”—would render the limited Section 1323(c) exception superfluous, which is an impermissible way to interpret the statute.

Likewise, 17 U.S.C. § 504(d) limits enhanced damages against proprietors of public establishments

to the “preceding period of up to three years”, a limitation that would be unnecessary if Section 507(b) already limited retrospective relief to the preceding period of up to three years.

That Congress has applied damages bars in specific, limited contexts elsewhere in Title 17 demonstrates that Congress did not do so for Title 17 generally.

*Second, Sohm* misreads this Court’s decision in *Petrella*. In *Petrella*, the plaintiff brought copyright claims based only on infringing acts that had occurred in the three years before she filed her complaint, recognizing that earlier claims were untimely because she was on notice of the claims for decades but did not sue. The defendants argued that even the plaintiff’s timely claims should be dismissed for laches. This Court rejected that argument, holding that a copyright plaintiff has the full three years after accrual to bring each copyright claim, even if earlier-accruing copyright claims (based on earlier infringing acts) would no longer be timely. In so holding, the Court adopted the so-called “separate-accrual rule”, *Petrella*, 572 U.S. at 671, rejecting the so-called “continuing wrong rule”. The Court, however, expressly set aside the question of what causes a claim to accrue in the first place. It also did not announce any damages bar; rather, it simply held, under the facts of that case, that the Copyright Act statute of limitations had taken account of the plaintiff’s delay in bringing suit because claims based on earlier acts of infringement had become time-barred in their entirety when she did not sue on



those separate claims within three years of their separate accrual.

*Third, Sohm's* damages bar ignores decades of congressional amendments to the Copyright Act, during which time Congress has not added a damages bar to Section 507(b), despite numerous court of appeals decisions permitting damages for timely claims under the discovery rule. Congress even has amended Section 507 itself, without adding a damages bar. This Court should not amend a statute to add language when Congress has chosen not to do so.

*Fourth, Sohm* contravenes the historical purposes of copyright law and remedies. By placing an atextual bar on damages for timely and meritorious copyright claims, *Sohm* undermines the balance Congress struck in encouraging the creation of new and important works.

D. Due to Petitioners' abandonment of *Sohm* and resistance to the Question Presented, many of their arguments and much of their authority are inapposite. The rationales of Petitioners' principal authorities—*TRW Inc. v. Andrews*, 534 U.S. 19 (2001); *Rotkiske v. Klemm*, 140 S.Ct. 355 (2019); and *Gabelli v. SEC*, 568 U.S. 442 (2013)—reject Petitioners' position. Interpreting the Copyright Act consistent with the statutory interpretation principles espoused by those decisions leaves no room for a damages bar. Petitioners ask the Court to ignore the plain text of Section 507(b) to create an "equitable exception" damages bar, which would be the functional equivalent of permitting laches as a defense to copyright claims, which the Court already rejected in *Petrella*. If Petitioners believe the Copyright Act

should have a damages bar, their recourse is with Congress, not this Court.

## ARGUMENT

### I. Whether the Copyright Act Has a Discovery Rule Is Not Before the Court.

#### A. Applicable Legal Principles.

It is a foundational constitutional precept that this Court has original jurisdiction over only a narrow set of cases, and generally is a court of appellate jurisdiction. See U.S. Const. art. III, § 2, cl. 2; *Martin v. Hunter's Lessee*, 14 U.S. 304, 330 (1816). It is “a court of review, not of first view”, *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 583 (2022), that “does not ordinarily decide in the first instance issues not decided below”, *City of Austin, Tex. v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61, 76-77 (2022). This Court rarely reaches antecedent issues assumed but not decided below. See *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (antecedent issue waived because Ninth Circuit did not address it).

Even where (unlike here) an issue was raised and decided below, this Court typically will not address issues upon which there is well-developed and unanimous agreement among the courts of appeals. Certiorari is “granted ‘only for compelling reasons,’ which include the existence of conflicting decisions on issues of law among federal courts of appeals and state courts of last resort.” *City & Cnty. of S.F., Cal. v. Sheehan*, 575 U.S. 600, 619 (2015) (Scalia, J., concurring in part and dissenting in part) (quoting Sup.Ct.R. 10). Review typically is limited to cases

involving principles “of importance to the public” and “cases where there is a real and embarrassing conflict of opinion and authority between the [c]ircuit [c]ourts of [a]ppeals”. See *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923) (dismissing the writ as improvidently granted where there was no conflict).

When the Court does grant certiorari, it rarely answers questions beyond the question presented, doing so “only in the most exceptional cases, where reasons of urgency or of economy suggest the need to address the unrepresented question in the case under consideration”. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992). The Court prohibits merits briefing from “rais[ing] additional questions or chang[ing] the substance of the questions already presented”. Sup.Ct.R. 24.1(a). Those rules promote fairness in the certiorari process, particularly for respondents who, without a clear question presented, would lack notice of what issues are and are not to be briefed. As the Court has put it, “[w]ere we routinely to entertain questions not presented in the petition for certiorari, much of [the efficiency of the certiorari process] would vanish, as parties who feared an inability to prevail on the question presented would be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted.” *Yee*, 503 U.S. at 536.

**B. The Viability of the Discovery Rule in Copyright Cases Is Not Properly Before the Court.**

Petitioners violate those foundational principles by attempting to dispute, rather than assume, that the discovery rule applied by the courts of appeals governs claim accrual under the Copyright Act.

*First*, whether the Copyright Act has a discovery rule was not litigated below. The magistrate judge and the district court assumed that the Copyright Act has a discovery rule and assumed it governed Respondents' claims, at the urging of *both* Petitioners *and* Respondents. *See* 1 C.A.App. 189-204; 2 C.A.App. 35-36, 83-86, 126-37, 236-39; 3 C.A.App. 19-27. The Eleventh Circuit granted interlocutory review "only" of a certified question regarding the availability of damages "when the discovery rule dictates the accrual of a copyright claim". *Nealy*, 2022 WL 18354071, at \*2; *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325, 1328, 1330 (11th Cir. 2023).

*Second*, Petitioners failed to preserve below their newfound challenge to the discovery rule, as they conceded in their petition for certiorari: "The availability of the discovery rule was not challenged below . . ." *See* Pet. 14 n.\*. This Court's practice is "to refrain from addressing issues not raised in the Court of Appeals", such as the discovery rule arguments Petitioners make here. *EEOC v. FLRA*,

476 U.S. 19, 24 (1986) (citing *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982)).<sup>2</sup>

*Third*, eleven courts of appeals unanimously agree that the discovery rule applies to Copyright Act claims. *See infra* Section II.A.2. None disagree. Petitioners concede that “a conflict in the courts of appeals has not yet developed” on that issue. Pet. 14 n.\*. Even *Sohm* upheld the discovery rule. 959 F.3d at 50. The Court should “not reward such bait-and-switch tactics by proceeding to decide the independently ‘uncertworthy’” question regarding the availability of the discovery rule. *Sheehan*, 575 U.S. at 620 (Scalia, J., concurring in part and dissenting in part).

*Fourth*, this Court limited the Question Presented to foreclose argument on the availability of the discovery rule. Petitioners concede as much: “The

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<sup>2</sup> Petitioners argue that “it would have been futile” to challenge the applicability of the discovery rule “in light of Eleventh Circuit precedent.” Pet. 14 n.\*. Petitioners provide no authority supporting a futility exception in circumstances like this. If Petitioners believed *Petrella* compelled a different result (as the Second Circuit held by recognizing a damages bar in *Sohm*, notwithstanding its prior adoption of the discovery rule), they could have made the same arguments below. The cases cited by Petitioners do not support their purported futility exception. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (petitioner preserved the issue by making the argument in “a few pages of its appellate brief”); *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 n.7 (2013) (the issue was “adequately preserved and presented” in the district court where respondent “urged the very position we adopt”); *Samia v. United States*, 599 U.S. 635, 642-43 (2023) (explaining that petitioner made the same constitutional arguments in the Second Circuit as made in this Court).

question presented in this case, as rephrased by the Court, assumes that the Copyright Act contains a discovery accrual rule applied by the circuit courts.” Pet.Br. 31 (citation omitted). Petitioners have chosen to fight the Question Presented rather than answer it. But “[t]he Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system.” *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (declining to consider petitioner’s argument raised for the first time in his opening brief on the merits under Sup.Ct.R. 14.1(a) and Sup.Ct.R. 24.1(a)).

Petitioners have focused their arguments on an issue not raised or decided below, on which there is no disagreement in the lower courts, and, in doing so, have attempted to change the Question Presented as limited by the Court—thereby depriving Respondents of fair notice of what should and should not be briefed and argued. As in *Visa Inc. v. Osborn*, “[a]fter ‘[h]aving persuaded us to grant certiorari’ on this issue, . . . petitioners ‘chose to rely on a different argument’ in their merits briefing.” 580 U.S. 993, 993 (2016) (quoting *Sheehan*, 575 U.S. at 608). Thus, as in *Visa*, the Court should dismiss the writ of certiorari as improvidently granted. *Id.*

Alternatively, the Court should decide only the limited Question Presented on which it granted certiorari.

## II. The Court Should Adopt the Majority Rule and Reject the Outlier *Sohm* Rule.

### A. Under the Copyright Act, Damages Are Available for Timely Claims.

#### 1. Basic Copyright Principles.

Under the Copyright Act, each act of infringement gives rise to a separate copyright infringement claim, and each individual claim rises and falls on its own merits, as was explained in *Petrella*, 572 U.S. at 671-72. Under the discovery rule, each copyright infringement claim accrues the moment a copyright holder learns—or reasonably should have learned—of the act of infringement giving rise to the claim. *See, e.g., Gaiman v. McFarlane*, 360 F.3d 644, 653 (7th Cir. 2004) (“the copyright statute of limitations starts to run when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his rights” (citing *Taylor v. Meirick*, 712 F.2d 1112, 1117 (7th Cir. 1983))).

Typically, even under the discovery rule, a claim will accrue when the act of infringement occurs because, ordinarily, the public nature of copyright infringement is sufficient to put the copyright holder on inquiry notice of their claim. *See William A. Graham Co. v. Haughey*, 568 F.3d 425, 435 (3d Cir. 2009) (“due to the nature of publication of works of art . . . generally the person injured receives reasonably prompt notice or can easily ascertain any infringement of his rights” (quoting S.Rep.No. 85-1014 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1961, 1962)). However, if an act of infringement reasonably goes undiscovered, the claim

will not accrue until the act is (or should have been) discovered by the copyright holder. *See Sohm*, 959 F.3d at 50 (a claim “does not ‘accrue’ until the copyright holder discovers, or with due diligence should have discovered, the infringement” (citation omitted)); *see also* cases cited *infra* Section II.A.2.

Under 17 U.S.C. § 507(b), the copyright holder must bring any civil action asserting a claim within three years of its accrual—*i.e.*, within three years of when the infringing act was or should have been discovered. If the copyright plaintiff brings a civil action asserting its claim within the three-year period after accrual, the plaintiff can seek as a remedy anything permitted by the Copyright Act, including damages and infringer’s profits under Section 504. *See* 17 U.S.C. § 504(a)-(c). If the plaintiff fails to assert the claim within the three-year period, that claim—in its entirety—is time-barred. *Petrella*, 572 U.S. at 671-72.

There is no distinction in the Copyright Act statute of limitations between claims that seek damages and those that do not. *See* 17 U.S.C. § 507(b). All variety and manner of general Copyright Act claims are subject to the same statute of limitations, Section 507(b).

In situations where numerous acts of infringement reasonably go undiscovered for a number of years, there will be a buildup of occurred-but-not-yet-accrued claims. *See, e.g., Starz Entm’t, LLC v. MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1239-41, 1247 (9th Cir. 2022). Once the copyright holder discovers (or, with diligence, reasonably should have discovered) those



past acts of infringement, each past act accrues into a separate claim. *Id.* at 1240-41. Many past acts of infringement—and, thus, many separate claims—may accrue on a single date. *Id.*; see also *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004) (citing *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994)).

Again, in that situation, if a copyright plaintiff fails to sue on the claims within the three-year period after the accrual date, those claims are time-barred; that is the practical effect of the separate accrual rule this Court announced in *Petrella*. 572 U.S. at 671-72. But, under the majority rule, if the copyright plaintiff does bring suit within the three-year period, he can seek all remedies for each independent claim. See *infra* Section II.A.2.

Of course, the acts of infringement might not stop on the accrual date, or the acts of infringement might be so obvious or easily ascertainable that the very first act of infringement might operate to put the copyright holder on notice of their claims, such that the date of the first infringing act also is the accrual date. For acts of infringement that occur after the accrual date, the three-year statute of limitations will begin to run immediately upon the acts of infringement giving rise to the claim. See *Petrella*, 572 U.S. at 682-83. Put differently, once the copyright holder discovers or is on notice of the infringer's infringing activities, the injury date and the accrual date merge into one. See *Starz*, 39 F.4th at 1240.

*Petrella* presented this situation. There, the defendant (MGM) had infringed the plaintiff's (Ms. Petrella's) screenplay for decades by releasing

the movie, *Raging Bull*. *Petrella*, 572 U.S. at 674. Due to the popularity of the movie and Ms. Petrella's repeated negotiations with MGM, the accrual date for those original infringements had occurred decades before the complaint was filed. *Id.* As a result, for many years, each new act of infringement accrued into a claim immediately upon the act of infringement taking place. Because Ms. Petrella had not sued for many years, numerous of those individual claims had become time-barred, as numerous three-year periods had passed without suit on the immediately accruing acts of infringement. Recognizing this, Ms. Petrella asserted claims only for acts of infringement that had occurred within the three-year period prior to the date on which she filed her lawsuit. *Id.* at 674-75.

MGM argued in *Petrella* that even those claims—*i.e.*, those brought within three years of when they accrued—should be dismissed because the doctrine of laches should be deployed to shorten the congressionally-mandated limitations period. *Id.* at 675. This Court rejected that argument, holding that laches cannot be used to shorten the statute of limitations. *Id.* at 677. The Court explained that this outcome was not unduly disadvantageous to alleged infringers because the separate accrual rule—by which earlier acts of infringement *had* become time-barred—took account of delay; those earlier claims disappeared forever when the plaintiff allowed three years to pass without suing on them. *Id.* at 682-83. The Court in *Petrella* expressly left the discovery rule intact. *Id.* at 670 n.4. It said nothing about a separate damages bar that operates independently of the statute of limitations.

## 2. The Majority Rule Permits Damages for All Timely Claims.

Every court of appeals to rule on the issue—the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits—has held that the discovery rule governs “accrual” under Section 507(b) and that, when it applies, a claim will be timely so long as it is filed within three years after the claim was or reasonably should have been discovered. See *Warren Freedensfeld Assocs. v. McTigue*, 531 F.3d 38, 44 (1st Cir. 2008); *Sohm*, 959 F.3d at 50; *Haughey*, 568 F.3d at 433; *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997); *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231, 233 (5th Cir. 2023), cert. petition filed, No. 23-474 (Nov. 2, 2023); *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004); *Gaiman*, 360 F.3d at 653; *Comcast of Ill. X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007); *Starz*, 39 F.4th at 1238; *Cooper v. NCS Pearson, Inc.*, 733 F.3d 1013, 1015 (10th Cir. 2013); *Nealy*, 60 F.4th at 1330.

And every one of those courts of appeals, except for the Second Circuit in *Sohm*, has permitted a copyright plaintiff to recover damages for claims rendered timely by the discovery rule. See *same cited cases*. Other than *Sohm*, none of those cases applied a damages bar.

The majority rule applies the teaching of *Petrella* to the Copyright Act as it is written. Each infringing act gives rise to an individual claim; each claim accrues when it is or should be discovered; each claim is timely so long as it is brought within three years of

when it accrues; and damages (and all other remedies) are available for all timely-filed claims, even if other claims, based on earlier acts, are time-barred in their entirety. *See, e.g., Nealy*, 60 F.4th at 1331; *Starz*, 39 F.4th at 1244.

Since *Sohm*, every court of appeals to consider the issue has declined to find a separate damages bar. *See Starz*, 39 F.4th at 1244 (rejecting *Sohm*); *Nealy*, 60 F.4th at 1331 (same); *Martinelli*, 65 F.4th at 244 n.7 (declining to reach the question). Dozens of district courts also have rejected the *Sohm* approach. *See Starz*, 39 F.4th at 1244 n.4 (collecting cases).

### **3. Basic Copyright Principles and the Majority Rule Compel Affirmance Here.**

It is instructive to consider how the majority rule operates under the facts of this case.

Nealy met with Whooping Crane and Pandisc in 2008. That meeting put him on notice that *those companies* might violate MSI's copyrights. Thus, if those companies had engaged in any subsequent infringing acts, Nealy would have been on notice of his claims and, thus, would have had three years from the date of any infringing act to assert a copyright infringement claim based on each such act. Because he was on notice, each act would have accrued into a claim immediately upon its occurrence. Even today, if Whooping Crane and Pandisc were to infringe MSI's copyrights, Nealy could file a civil action for damages within three years of those new infringing acts (each giving rise to a separate and newly-accruing claim), but all past infringing acts (on which Nealy did not

sue within three years) are gone forever. That is what *Petrella* holds and is how the Copyright Act takes account of delay.

Nealy's claims against Petitioners are different. Petitioners engaged in numerous infringing acts between 2008 and 2016, but Nealy was not reasonably on notice of infringements by Petitioners until 2016, so those past acts of infringements did not accrue into claims until 2016. Even in the Second Circuit, Nealy had three years from that date of accrual to bring suit on those past infringements. Having done so, under the majority rule, he is entitled to seek damages for each individual claim.

**B. The Damages Bar Recognized by the Second Circuit in *Sohm* Has No Defensible Basis.**

**1. The *Sohm* Damages Bar Is Incompatible with the Text and Structure of the Copyright Act.**

The *Sohm* bar on retrospective relief—and Petitioners' requested "equitable exception" damages bar, Pet.Br. 42—cannot be reconciled with the text and structure of the Copyright Act.

1. The Copyright Act has a single default statute of limitations for civil claims that, on its face, applies to all manner of "[c]ivil [a]ctions" and all types of copyright "claim[s]". 17 U.S.C. § 507(b). There is no separate statutory provision limiting damages for timely claims; nor is there any provision treating damages claims differently from claims seeking other forms of relief.

Section 504, titled “Remedies for infringement: Damages and profits”, makes clear that “[t]he copyright owner is **entitled to recover the actual damages** suffered by him or her . . . and **any** profits of the infringer that are attributable to the infringement”, or statutory damages for “**all** infringements involved in the action”. 17 U.S.C. § 504(b)-(c)(1) (emphases added). Words in a statute should be given their plain meaning unless Congress has provided a different definition. *See FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011). Limiting damages to those incurred during the three years before a complaint is filed would be contrary to the plain meaning of the words “any”, “actual” and “all” in Sections 504(a)-(c).

2. Other provisions of Title 17 confirm that reading.

Section 507 is an umbrella provision that applies generally to Title 17. *See* 17 U.S.C. § 507(a) (“[e]xcept as expressly provided otherwise **in this title**”) (emphasis added); 17 U.S.C. § 507(b) (“[n]o civil action shall be maintained **under the provisions of this title**”) (emphasis added). It expressly governs “civil action[s]” “maintained under the provisions of this title”, *i.e.*, Title 17, and was included in the original 1976 amendments to Title 17. *See* Act of Sept. 7, 1957, Pub.L.No. 85-313, § 1, 71 Stat. 633, 633 (adopting 17 U.S.C. § 115 (1958)); Copyright Act of 1976, Pub.L.No. 94-553, § 101, 90 Stat. 2541, 2585-86.

In 1998, Congress added as Chapter 13 to Title 17 the Vessel Hull Design Protection Act (“VHDPA”). *See* Digital Millennium Copyright Act, Pub.L.No. 105-304, tit. V, 112 Stat. 2860, 2905 (1998),

*codified at 17 U.S.C. ch. 13.* The VHDPDA contains a bespoke remedies provision in Section 1323, which permits (a) “damages adequate to compensate for the infringement” of hull design and (b) “infringer’s profits” “reasonably related to the use of the claimant’s design”. *Id.* § 1323(a)-(b). It also contains a separate statute of limitations, which reads “[n]o recovery under subsection (a) or (b) shall be had for any infringement committed more than 3 years before the date on which the complaint is filed”. *Id.* § 1323(c).

Section 1323(c), on its face, is a three-year look-back damages bar that (for vessel hull design infringement claims) operates as an exception to Title 17’s general statute of limitations, Section 507. Critically, if there were no general discovery rule in Title 17—such that accrual under Section 507(b) meant when an infringement “was committed” or “occurred”—Section 507(b) would work exactly how Section 1323(c) reads, and there would be no reason to have Section 1323(c). Stated differently, if “commitment” or “occurrence” determined claim accrual generally (as Petitioners assert), there could be no recovery of damages or infringer’s profits for acts committed more than three years before the complaint was filed—for hull design or for anything else—and the separate statute of limitations in Section 1323(c) would be unnecessary.

Thus, Congress’s decision to enact Section 1323(c) demonstrates why Petitioners’ construction of Section 507(b) is wrong. It is a “cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented,

no clause, sentence, or word shall be superfluous, void, or insignificant”. *TRW*, 534 U.S. at 31 (citation omitted). Statutes should be read consistent with “the interpretive principle that every clause and word of a statute should have meaning.” *U.S. ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023) (citation omitted). “A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Corley v. United States*, 556 U.S. 303, 314 (2009) (citation omitted).

The exception created by Congress in Section 1323(c) for hull design has purpose and meaning **only if** it provides a rule different from the default rule of Section 507(b). Because Section 1323(c) imposes a damages bar—and rejects the discovery rule for vessel hull design infringement—the default rule for Title 17 must be that there is no damages bar but there is a discovery rule. If the default rule provided a damages bar and/or no discovery rule, Section 1323(c) would do no work—its exception already would be the default rule. Thus, Petitioners’ interpretation would render Section 1323(c) superfluous, which is not permitted. *TRW*, 534 U.S. at 31.

*TRW Inc. v. Andrews*, cited extensively by Petitioners, is instructive. There, the Court considered two statutes of limitations in the Fair Credit Reporting Act (“FCRA”): (i) a general one, which required suit within two years of when “liability arises”; and (ii) a more specific one, which permitted certain plaintiffs to file suit within two years of discovery. *Id.* at 28. The Court held that the discovery rule could not govern the entire statute,



because “Congress implicitly excluded a general discovery rule by including a more limited one.” *Id.* Here, Congress also has enacted two statutes of limitations in Title 17: (i) a general one, which requires a “civil action” to be brought within three years of when a “claim accrue[s]”, 17 U.S.C. § 507(b); and (ii) a more specific one, which limits recovery in hull design cases to infringements “committed” during the three years before suit was filed, *id.* § 1323(c). Like the FCRA, Title 17 should be construed in a manner that ensures “no clause, sentence or word shall be superfluous, void, or insignificant”, *TRW*, 534 U.S. at 31, which means that there cannot be a generally applicable damages bar, because “Congress implicitly excluded a general [damages bar] by including a more limited one”, *id.* at 28. On the other hand, there must be a generally applicable discovery rule because, without it, the default rule of Section 507(b) would be the same as the Section 1323(c) exception, rendering the Section 1323(c) exception superfluous. *See TRW*, 534 U.S. at 31.

Nor is the separate treatment in Section 1323(c) an accident. Congress permits copyright holders to recover for copyright infringement within three years of when a claim accrues, even if the defendant had been engaging in similar infringing acts for decades. *See Petrella*, 572 U.S. at 671-72. That default rule for copyright claims reflects Congress’s judgment that, in general, the public benefits from strong and long-lasting copyright protection because it encourages the creation of all manner of copyrightable works by others. *See id.*; *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (“[C]opyright law *celebrates* the profit motive, recognizing that the incentive to profit from

the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science.” (citation omitted)). Congress made a different judgment about how much protection to afford hull designs, permitting damages for copying, but limiting those damages to infringements committed only during the three years prior to suit. Congress’s policy choices should be respected.<sup>3</sup>

3. Section 1323(c) is not the only provision of Title 17 to conflict with the *Sohm* damages bar and Petitioners’ requested “equitable exception”. In 1998, Congress also added a new subsection to existing Section 504. See Sonny Bono Copyright Term Extension Act, Pub.L.No. 105-298, § 204, 112 Stat. 2827, 2833 (1998). Section 504(d) permits “additional damages in certain cases” involving proprietors of public establishments, limited to “the preceding period of up to 3 years”, 17 U.S.C. § 504(d), which, again, would be unnecessary if the default Title 17 rule already limited all damages to those incurred during the preceding three-year period. Similar to Section 1323(c), Section 504(d)’s three-year limitation for enhanced damages would be superfluous if Section 507(b) separately and generally barred all damages

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<sup>3</sup> Notably, when Congress added Chapter 9 to Title 17, to protect semiconductor chip design, it made clear that the other provisions of Title 17 would not apply to Chapter 9. See 17 U.S.C. § 912(b). Congress included no such carve-out for Chapter 13, meaning that, in the absence of Section 1323(c), Section 507(b) of Title 17 would govern the timeliness of any civil action maintained under Chapter 13. Section 1323(c) was necessary *only* to provide a different rule from Section 507(b).

outside the same three-year period. *Corley*, 556 U.S. at 314; *see also* Br. of Amicus Curiae Am. Intell. Prop. L. Ass’n 13 (“when Congress desires in the Copyright Act to impose a temporal limitation on damages, it does so expressly”).

It is telling that Congress added Sections 1323(c) and 504(d) in 1998, by which time at least four courts of appeals had adopted a discovery rule and permitted damages outside the three-year period prior to filing a lawsuit. *See, e.g., Taylor*, 712 F.2d at 1118; *Stone v. Williams*, 970 F.2d 1043, 1048-49 (2d Cir. 1992); *Roley*, 19 F.3d at 481; *Hotaling*, 118 F.3d at 202. Had Congress intended the three-year look-back damages bars of Sections 1323(c) and 504(d) to apply to copyright claims more generally—or had it wanted to eliminate the discovery rule—it could have added the language from Sections 1323(c) or 504(d) to Section 507(b). But it chose not to do so.

4. Congress’s choices in 1998 are made all the more striking by its decision in 2020 to re-use the language of Section 507(b) when creating the statute of limitations in Section 1504(b)(1) for bringing a claim before the newly constituted Copyright Claims Board. Under Section 1504(b)(1), “[a] proceeding may not be maintained before the Copyright Claims Board unless the proceeding is commenced . . . before the Copyright Claims Board not later than 3 years after the claim accrued.” 17 U.S.C. § 1504(b)(1). Congress demonstrated it knew how to enact a non-discovery rule damages bar in 1998 when it enacted Sections 1323(c) and 504(d), but chose a different rule in 2020 when drafting Section 1504(b)(1). That choice reflects a clear understanding that the language of Section

507(b), mirrored in Section 1504(b)(1), does not contain a damages bar.

5. Another example of Congress's knowledge of how to craft a damages bar is found in the Patent Act, in which Congress expressly included a generally applicable damages bar in 1952, prior to enacting the language now codified at Section 507(b) of the Copyright Act in 1957. *See* Patent Act of 1952, Pub.L.No. 82-593, 66 Stat. 792, 813. Section 286 of the Patent Act, titled "Time limitation on damages", provides that "[e]xcept as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action." 35 U.S.C. § 286. As with Sections 1323(c) and 504(d) of the Copyright Act, Section 286 of the Patent Act demonstrates that Congress has long known how to expressly adopt a damages bar.

6. It is also notable that Congress used "accrue" to describe the starting trigger for the civil statute of limitations in Section 507(b), but "arose" to describe the starting trigger for the criminal statute of limitations in Section 507(a). *Compare* 17 U.S.C. § 507(a) ("Except as expressly provided otherwise in this title, no criminal proceeding shall be maintained under the provisions of this title unless it is commenced within 5 years after the cause of action **arose**."), *with id.* § 507(b) ("No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim **accrued**.") (emphases added). Where Congress uses one term in one place, and a different term in another place, the presumption is that the different terms

have different meanings. *See Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457-58 (2022) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012)). The different usage of “accrue” and “arose” in Section 507 supports a discovery rule without a damages bar for civil copyright claims. *Haughey*, 568 F.3d at 434-35.

Petitioners dismiss the difference in wording between “accrue” and “arose” as “idiosyncratic” drafting, Pet.Br. 30, but it is nothing of the sort. The word “arose” appears twice in Title 17 and, both times, it is used in connection with a criminal statute of limitations. *See* 17 U.S.C. §§ 507(a), 1204(c). The word “accrue”, in the sense of a claim accruing, is used four times in Title 17, each time in connection with a civil statute of limitations. *See* 17 U.S.C. §§ 115(c)(10)(C), 507(b), 911(d), 1504(b)(1). That word choice is intentional and should be given meaning.<sup>4</sup>

## **2. The *Sohm* Damages Bar Is Incompatible with *Petrella*.**

*Sohm* fashioned its damages bar by misreading isolated statements from this Court’s decision in *Petrella* divorced from their context, when that very context makes clear that *Petrella* was describing not a separate damages bar in Section 507(b), but rather

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<sup>4</sup> Contrary to Petitioners’ arguments, the word “accrue” does not have a single definition divorced from the context in which it is used. *See Reading Co. v. Koons*, 271 U.S. 58, 61-62 (1926). Here, the context and structure of Title 17 compel the inference that “accrue” must mean something different from “arose” (and neither implies a damages bar divorced from Title 17’s statute of limitations).

the operation of the separate accrual rule for the claims at issue there.

Ms. Petrella, the plaintiff in that case, was aware that MGM had engaged in numerous acts of infringement for over two decades. *Petrella*, 572 U.S. at 674-75. Given her awareness of MGM's conduct, she did not dispute that she had constructive knowledge of each act of infringement as it occurred, meaning that each claim accrued immediately upon the act of infringement giving rise to the claim. *Id.* at 675-76. But, because each act of infringement gave rise to an entirely new claim, she argued that claims based on infringements that had occurred within the preceding three years necessarily were timely. *Id.* at 674-75. It was irrelevant, she argued, that other claims, based on infringements that had occurred more than three years before, were untimely. *Id.* at 675. Her lawsuit did not involve those earlier claims. In response, MGM argued that because Ms. Petrella had elected not to sue for earlier acts of infringement, the doctrine of laches barred all claims, even claims that had accrued during the preceding three years. *Id.*

This Court rejected MGM's argument. It held that a copyright holder has three years from the date on which each individual claim accrues to bring suit on that particular claim, and laches cannot be used to shorten the three-year statutorily prescribed period. *Id.* at 667. That is a fair result, *Petrella* explained, in part because each earlier-accrued claim *had* expired when the three-year period ran without the copyright holder commencing suit on it. *Id.* at 677-78. In that way, due to the "separate accrual rule", "the copyright

statute of limitations, § 507(b), itself takes account of delay.” *Id.* at 677. Those are the teachings of *Petrella*.

The Court expressly preserved the discovery rule, stating that “[a]lthough we have not passed on the question, nine Courts of Appeals have adopted, as an alternative to the incident of injury rule, a ‘discovery rule’, which starts the limitations period when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.” *Id.* at 670 n.4 (citations omitted). The Court also used qualified language when discussing accrual, accounting for the operation of the discovery rule in other cases, but not that one. *See id.* at 670 (“A claim *ordinarily* accrues when a plaintiff has a complete and present cause of action. In other words, the limitations period *generally* begins to run at the point when the plaintiff can file suit and obtain relief.” (citations omitted and emphases added)); *id.* at 672 (“the copyright holder’s suit *ordinarily* will be timely under § 507(b) with respect to more recent acts of infringement (*i.e.*, acts within the three-year window), but untimely with respect to prior acts of the same or similar kind” (emphasis added)).

*Sohm* mistakenly relies on statements from *Petrella* that, read in isolation, might appear to speak without qualification regarding the availability of damages under the Copyright Act: (i) “under the [Copyright] Act’s three-year provision, an infringement is actionable within three years, and only three years, of its occurrence,” and [] ‘the infringer is insulated from liability for earlier infringements of the same work’; (ii) “§ 507(b)’s limitations period . . . allows plaintiffs . . . to gain retrospective relief

running only three years back from the date the complaint was filed”; (iii) “a successful plaintiff can gain retrospective relief only three years back from the time of suit”; and (iv) “[n]o recovery may be had for infringement in earlier years”. *Sohm*, 959 F.3d at 51-52 (quoting *Petrella*, 572 U.S. at 671-72, 677). But, read in context, those statements are qualified and tied to the specific facts of *Petrella*. The first two quotations immediately follow and are embedded in paragraphs explaining the operation of the separate accrual rule in *Petrella*. 572 U.S. at 671-72. And the third and fourth quotations comprise two parts of a sentence that begins with a cross-reference to the same, preceding portion of the opinion. *Id.* at 677. All four statements merely describe and summarize the operation of the separate accrual rule on the specific facts of *Petrella*, and they do not create an atextual damages bar (with no support in the Copyright Act) for discovery rule claims, which were not even at issue in that case.

The dicta in *Petrella* saying Section 507(b) “looks back” was shorthand for how courts can determine what infringing acts are at issue in a case where the plaintiff does not rely on the discovery rule to establish the timeliness of her claims. *See id.* at 686. In those types of cases, where the date of the infringing acts and the date of accrual are one and the same, courts can simply “look back” to the prior three years to determine the relevant infringing acts and corresponding damages. *See Starz*, 39 F.4th at 1245-46 (“Plainly the Court’s look-back language was simply a shorthand for the statute of limitations laid out in § 507(b) in incident of injury cases—where infringement and accrual occur simultaneously.”).



Those statements did not mean—in fact, could not have meant—that one looks back three years to determine what damages are available under the discovery rule. Section 507(b), by its express terms, looks forward from the date of accrual and asks whether the “civil action” was “commenced within three years after the claim accrued.” 17 U.S.C. § 507(b).<sup>5</sup>

In short, the Court held in *Petrella* that it was the separate accrual rule—not a stand-alone damages bar—that was the aspect of the Copyright Act that accounts for delay and renders laches unnecessary. 572 U.S. at 677. The Court expressly declined to reach the question whether the Copyright Act has a discovery rule. *Id.* at 670 n.4. There is no support for *Sohm*’s conclusion that the Court reached beyond the issues presented to create an atextual damages bar that would not even have applied to Ms. Petrella’s claims.

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<sup>5</sup> In *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, this Court quoted *Petrella* to reject respondent’s argument that laches could be available for statutes of limitation that run backward, even if laches was not available for statutes of limitation that run forward, holding that laches generally cannot be used to shorten a congressionally-mandated limitations period. 580 U.S. 328, 336-38 (2017). The Court again was careful to qualify its language, both by using the adverb “ordinarily” to modify its description of what it means for a claim to accrue and by expressly stating that it still had not passed on whether accrual under the Copyright Act is governed by a discovery rule. *Id.* at 337-38.

**3. Adopting the *Sohm* Damages Bar Would Disrupt Decades of Historical Practice, When Congress Repeatedly Has Determined Not To Disrupt that Practice.**

Congress has amended Title 17 *seventy-eight times* since 1976. U.S. Copyright Office, *Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code* viii-xv (2022), <https://www.copyright.gov/title17/title17.pdf>. Those amendments ranged from major overhauls—such as the Sonny Bono Copyright Term Extension Act, Pub.L.No. 105-298, 112 Stat. 2827 (1998) (which changed the copyright term from life plus 50 years to life plus 70 years)—to technical and corrective refinements—such as the Copyright Cleanup, Clarification, and Corrections Act of 2010, Pub.L.No. 111-295, 124 Stat. 3180 (which made miscellaneous clarifying, conforming, and technical corrections throughout Title 17). Congress even has amended Section 507 twice. *See* Pub.L.No. 105-147, § 2(c), 111 Stat. 2678, 2678 (1997); Pub.L.No. 105-304, § 102(e), 112 Stat. 2860, 2863 (1998).

The courts of appeals have applied a discovery rule without a damages bar for decades, since at least 1983. *See Taylor*, 712 F.2d at 1118. Yet, in all its seventy-eight amendments, Congress never stepped in to clarify that the courts of appeals were getting it wrong. To the contrary, (i) Congress maintained the “accrual” language in Section 507(b) through each of its seventy-eight amendments; and (ii) adopted that same language when it intended new provisions to have the same discovery rule without a damages bar,

*see* 17 U.S.C. §§ 911(d), 1504(b)(1); but (iii) used different language when it intended the courts to apply a damages bar without a discovery rule, *see id.* §§ 504(d), 1323(c).

Reading a three-year look-back damages bar into Section 507(b)—or imposing that rule as part of amorphous equitable relief—would undermine Congress’s clear intent. “The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.” *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940); *see also Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).<sup>6</sup>

#### **4. The *Sohm* Damages Bar Contravenes Long-Standing and Well-Established Public Policy, as Reflected in the Copyright Act.**

The Founders recognized, and the Constitution enshrined, a fundamental goal of encouraging artistic development by protecting artists’ rights in their work. *See* U.S. Const. art. I, § 8, cl. 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”). In his

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<sup>6</sup> The “separation of powers” arguments advanced by certain *amici* cut against Petitioners, not for them. The Court should not amend Title 17 to recognize a general damages bar when Congress repeatedly has declined to do so.

inaugural State of the Union Address, President Washington urged Congress: “[T]here is nothing, which can better deserve your patronage, than the promotion of Science and Literature.” *Journal of the Senate*, 1st Cong., 2d Sess. 5-8 (Jan. 8, 1790). Congress responded months later with the Copyright Act of 1790, which expressly permitted an award of damages for copyright infringements to promote “the encouragement of learning”. Copyright Act of 1790, Pub.L.No. 1-15, §§ 2, 6, 1 Stat. 124, 125.

This same goal persists in the modern-day Copyright Act. “The immediate effect of our copyright law is to secure a fair return for an authors’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (citation omitted). “The Copyright Clause embodies the ‘conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and investors’ and empowers Congress to create a ‘system’ that promotes these goals.” H.R.Rep.No. 116-252, at 20 (2019) (citing *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Eldred*, 537 U.S. at 212 n.18, 213).

Congress has cautioned that “the inability to enforce rights corrodes respect for the rule of law and deprives society of the benefit of new and expressive works of authorship”. *Id.* at 19 (citation omitted). This Court has recognized the same principle: “[t]he profit motive is the engine that ensures the progress of science”. *Eldred*, 537 U.S. at 212 n.18 (citation omitted).

A damages bar that prevents *successful* copyright plaintiffs—*i.e.*, those who have *timely* and *meritorious* claims—from recovering damages serves no legitimate public policy interest and, instead, contravenes the careful balance Congress struck in the Copyright Act.<sup>7</sup>

### III. Petitioners' Arguments Are Inapposite.

#### A. Petitioners' Attacks on the Discovery Rule Are Inapposite to the Question Presented.

As a consequence of Petitioners' attempt to avoid the Question Presented, much of their brief is inapposite to the Question Presented, including the discussion of criminal procedure cases concerning the Fifth Amendment right against self-incrimination. Those cases safely can be ignored.

Petitioners repeatedly cite *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), *Rotkiske v. Klemm*, 140 S.Ct. 355 (2019), and *Gabelli v. SEC*, 568 U.S. 442 (2013). None of those cases held, or even considered, that damages

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<sup>7</sup> *Sohm* upsets this balance by functionally extinguishing *all* relief for claims rendered timely by the discovery rule. With damages barred, only injunctive relief remains a theoretical possibility. However, injunctive relief rarely (if ever) will be available for claims rendered timely by operation of the discovery rule, because, by definition, the infringing act giving rise to those claims occurred more than three years in the past, thus eliminating the possibility of ongoing or immediate harm from those claims, and leaving those claims with no remedy. See *Nealy*, 60 F.4th at 1333-34.

might be unavailable for timely claims. That peculiar rule was invented by the *Sohm* court.

Moreover, properly understood, each case rejects Petitioners' arguments.

As explained, this Court's analysis in *TRW* refutes each of Petitioners' arguments and requires affirmance here. *See supra* Section II.B.1.

So, too, for *Rotkiske*. There, the Fair Debt Collection Practices Act (FDCPA) expressly stated the limitations period began "from the date on which the violation occurs." 15 U.S.C. § 1692k(d). In concluding that the FDCPA meant what it said, the Court applied the plain meaning of the statute. *Rotkiske*, 140 S.Ct. at 360. Petitioner *Rotkiske* did not contest the plain meaning of Section 1692k(d), but instead argued that the Court should "read in" a general discovery rule. *Id.*

The Court explained that "[a]textual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision. Congress has enacted statutes that expressly include the language *Rotkiske* asks us to read in . . . ." *Id.* at 361. Here, Congress has "expressly include[d] the language [Petitioners] ask [the Court] to read in", *id.*—in both Section 1323(c) and Section 504(d) **of Title 17 itself**. Thus, as in *Rotkiske*, the Court should decline to "read in" either the atextual damages bar found in *Sohm* or the similarly atextual "equitable exception" urged by Petitioners, because Congress clearly knows how to adopt the omitted language when that is its intent.

*Gabelli* does not support Petitioners either. Although in *Gabelli* this Court construed “accrued” to enact an injury rule, the context of that case and the history of that statute contrast sharply with the Copyright Act. There, no court in the first 160 years after enactment of the statute of limitations at issue for civil fines, penalties or forfeiture had construed that statute of limitations to include a discovery rule, and there was no indication that Congress had intended to adopt a discovery rule for government enforcement actions. *See* 568 U.S. at 449-50. The opposite is true here, where, for decades, every court of appeals to have considered the issue has held that accrual under Section 507(b) includes a discovery rule, *see supra* Section II.A.2, and where, in the face of that extensive precedent, Congress repeatedly has built upon the foundation of that judicial interpretation, including by using different words when it intends statutes of limitation in Title 17 to work differently and the same words when it intends the meaning to be the same, *see supra* Section II.B.3. In all events, *Gabelli* provides no support for a separate damages bar.

Petitioners’ argument that the discovery rule in copyright cases should be limited to fraud, medical malpractice, or latent disease is specious. *See* Pet.Br. 31-41. The Question Presented is limited to the availability of damages “under *the* discovery accrual ***applied by the circuit courts***”, a discovery rule that has nothing to do with fraud, medical malpractice or latent disease. Petitioners, again, improperly attempt to rewrite the Question Presented.

Moreover, the cases Petitioners cite merely establish that there can be a discovery rule for causes of action concerning fraud, medical malpractice and latent disease, even without evidence that Congress intended to adopt that rule. *See id.* at 33-39. Resorting to that principle is unnecessary here, where there is ample evidence that Congress intended to adopt the rule that the courts of appeals have applied. It would be nonsensical to limit Copyright Act discovery rule cases to fraud, medical malpractice or latent disease because copyright claims involve none of those things.

Although Petitioners' cases are far afield from the issues presented here, even those cases call into question the *Sohm* rule because, in each of them, where the discovery rule applied, there was no discussion of a damages bar. *See Bailey v. Glover*, 88 U.S. 342, 347-48 (1874); *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949).

## **B. The Discovery Rule Is Applied Consistently by the Courts of Appeals.**

1. The discovery rule operates uniformly across courts of appeals, including in the Second Circuit, to permit the filing of a copyright claim within three years after the claim was or reasonably should have been discovered. There is no inconsistency in the operation of the discovery rule, with the exception of the Second Circuit's *Sohm* damages bar.

Petitioners' arguments regarding circuit variance in the rationale for the discovery rule or regarding eligibility for the discovery rule's application are



inapposite: the Question Presented *assumes* the application of the discovery rule and asks what effect its operation has on the availability of damages. The underlying rationales for recognizing the discovery rule itself are not at issue (and, in all events, the discovery rule is firmly supported by the text of Title 17, for the reasons described above).

2. To the extent *amici* focus on purported distinctions between ownership and infringement copyright claims, that issue is immaterial to the case at bar. The parties stipulated that “this case presents ‘an ownership dispute’”, C.A.Supp.App. 636, and the Eleventh Circuit applies the discovery rule in ownership cases, *Nealy*, 60 F.4th at 1330. Thus, the Court can resolve the *Sohm* conflict here, without addressing any purported distinction between how the discovery rule works for ownership and infringement claims.

If, however, the Court feels compelled to reach that issue, Respondents make two points.

*First*, under *Petrella*, “each infringing act starts a new limitations period.” 572 U.S. at 671. That express holding of *Petrella* rejects prior caselaw from some courts of appeals suggesting that, when a copyright holder learns that someone else claims ownership over the copyrighted work, she must sue within three years or lose the ability to sue even for later infringing acts. Indeed, the plaintiff in *Petrella* knew that MGM had claimed an ownership interest in the copyright for decades, yet she was permitted to sue on recent infringements, despite not suing earlier.

*Second*, a copyright claim requires both (i) ownership and (ii) an infringing act. See 17 U.S.C. § 501(a)-(b); see *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Mere assertion of contrary ownership does not give rise to an infringement claim. When a third party asserts ownership of a copyright and the actual copyright owner learns of that assertion, that typically puts the actual copyright owner on notice of potential infringements by that third party, such that each infringing act that occurs thereafter accrues into a claim immediately upon its occurrence. Disputed ownership, once learned, puts the plaintiff on notice. But the plaintiff still has three years from the date of the accrual of the claim for any infringing act to sue. Again, those are the facts of *Petrella*.

Relevant here, Nealy learned that Petitioners claimed ownership of a copyright in the relevant works in 2016. As a result, 2016 became the relevant notice date, and Nealy had three years from 2016 to sue on infringing acts by Petitioners that had occurred before 2016 (because claims for those earlier acts accrued when he received notice in 2016), but he also has three years to sue from the occurrence of any future infringing acts by Petitioners (because claims for those new acts will accrue separately upon their occurrence, now that Nealy is on notice), as *Petrella* held.

**C. Petitioners Do Not Defend the *Sohm* Damages Bar, Thus Tacitly Conceding It Is Error, and Instead Argue for an Impermissible “Equitable Exception”.**

Petitioners mention *Sohm* *once* in their entire opening merits brief. *See* Pet.Br. 26. That single reference is not to *Sohm*’s holding, but as part of a string cite to support their flawed reading of *Petrella*. *See id.* Petitioners tacitly concede *Sohm*’s error.

Rather than defend *Sohm*, Petitioners ask this Court to “weigh[] policy considerations” and “apply the three-year limitation on retrospective relief as an equitable exception”. *Id.* at 41-42. But the Court already rejected Petitioners’ arguments in *Petrella* when it refused to permit laches as a defense to copyright claims. Recognizing an “equitable exception” that forecloses retrospective relief for successful copyright plaintiffs is the functional equivalent of allowing copyright defendants to use laches as a defense to timely claims. Laches *is* an “equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought.” *Laches*, Black’s Law Dictionary (11th ed. 2019). What Petitioners seek here is what the Court rejected in *Petrella*.

The Court in *Petrella* rejected Petitioners’ policy arguments too. Petitioners say it would be prejudicial to permit damages for claims rendered timely by the discovery rule because “evidence has been lost, memories have faded, and witnesses have disappeared.” Pet.Br. 43-44 (quoting *Gabelli*, 568 U.S. at 448). But, as the Court held in *Petrella*,

because the “plaintiff bears the burden of proving infringement”, “[a]ny hindrance caused by the unavailability of evidence . . . is at least as likely to affect plaintiffs as it is to disadvantage defendants”. *Petrella*, 572 U.S. at 683-84. In addition, as the Court explained in *Petrella*, copyright registration is required before a copyright owner may sue for infringement, ensuring that the “[k]ey evidence in the litigation”—“the certificate, the original work, and the allegedly infringing work”—are preserved, reducing the need for extrinsic evidence. *Id.* at 684.

Moreover, the Copyright Act contemplates and permits the passage of time before claims are asserted by allowing “reversionary renewal rights exercisable by an author’s heirs”. *Id.* at 683. “Congress must have been aware that the passage of time and the author’s death could cause a loss or dilution of evidence”, yet chose to “give the author’s family ‘a second chance to obtain fair remuneration’”. *Id.* (citation omitted).

Petitioners argue that because the Copyright Act permits statutory damages, a broad discovery rule would lead to “substantial mischief”. Pet.Br. 30 n.6. But the availability of statutory damages cuts against Petitioners’ arguments, not in favor of them. The availability of statutory damages “for all infringements involved in the action”, 17 U.S.C. § 504(c), reflects Congress’s judgment that a successful copyright plaintiff *always* should be able to achieve “retrospective relief” for timely and meritorious claims, even where its actual damages and infringers’ profits are very low, difficult to prove, or even nonexistent. That is because the primary goal of copyright law is utilitarian; it permits recovery for

infringements not merely to compensate the copyright owner, but to incentivize the creation of future works by others. *See Eldred*, 537 U.S. at 212 n.18. It is Congress's prerogative to strike the appropriate balance. A rule that eliminates damages even for timely claims, as the *Sohm* rule does, cannot be reconciled with Congress's judgment that a successful copyright plaintiff should recover retrospective relief in the form of statutory damages, even if it has no actual damages.

Petitioners warn that a "broad discovery rule" would be a "boon to copyright 'trolls'". Pet.Br. 31 n.6. Whether that risk is so great that the Copyright Act should be amended is not an issue for this Court to decide. It is an issue for Congress.

And it is irrelevant here: Mr. Nealy is not a copyright troll. Mr. Nealy paid for the works at issue to be created and, as the rightful copyright owner, is entitled to determine how the works are exploited and to benefit from their exploitation. When companies like Petitioners create works that are not original in their own right but, instead, rely on original works created by others to earn substantial profits, they must be certain to license the underlying works from the correct persons and entities that actually own them. The copyrights at issue were registered to Respondents. Petitioners, who knew exactly what works they sought to license from Mr. Butler, were in a better position than Mr. Nealy (who did not know about the unlawful licenses) to determine copyright ownership. Any prejudice to Petitioners from not doing so comes from their own lack of diligence, not Mr. Nealy's.

Petitioners take issue with the discovery rule. But their recourse is to Congress, not this Court. Congress has amended Title 17 nearly 80 times since 1976, including many times since the courts of appeals recognized the discovery rule, yet it has not implemented a damages bar or an injury rule. See *supra* Section II.B.3. If Petitioners believe the Copyright Act should be amended to deal with copyright trolls, that is a matter for the legislature. See *United States v. Davis*, 139 S.Ct. 2319, 2336 (2019) (“[T]his Court is not in the business of writing new statutes to right every social wrong it may perceive.”).

**CONCLUSION**

For the reasons stated above, the decision of the court of appeals should be affirmed.

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Respectfully Submitted,

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